

NTSB Order No. EA-5018

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 4th day of February, 2003

Docket SE-16225

The Administrator and the respondent have appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on July 17, 2001.¹ By that decision, the law judge upheld the Administrator's allegation that respondent violated section 91.319(c) of the Federal Aviation Regulations (FARs), but dismissed the Administrator's section 91.13(a)

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charge.² The law judge also modified the 60-day suspension of respondent's Airline Transport Pilot ("ATP") certificate imposed by the Administrator's order to a 15-day suspension.

On or about April 4, 2000, respondent piloted a North American F-100F, N26AZ, a surplus military aircraft with an experimental-category special airworthiness certificate. During the flight, respondent made a high-speed approach to, and low-level pass over, runway 12 at the non-towered Lordsburg Municipal Airport, Lordsburg, New Mexico. Respondent flew his approach and low-level pass in the "clean" configuration (i.e., without flaps

² FAR sections 91.13 and 91.319, 14 C.F.R. Part 91, provide, in relevant part, as follows:

Sec. 91.13 Careless or reckless operation.

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

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Sec. 91.319 Aircraft having experimental certificates: Operating limitations.

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(c) Unless otherwise authorized by the Administrator in special operating limitations, no person may operate an aircraft that has an experimental certificate over a densely populated area or in a congested airway. The Administrator may issue special operating limitations for particular aircraft to permit takeoffs and landings to be conducted over a densely populated area or in a congested airway, in accordance with terms and conditions specified in the authorization in the interest of safety in air commerce.

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or landing gear extended) at an airspeed of at least 300 knots.³ After the low-level pass over the runway, respondent initiated a steep climb-out and lit the aircraft's afterburner. The Administrator alleged that respondent's operation was careless, in violation of FAR section 91.13(a), and that, in violation of FAR section 91.319(c), it was contrary to the aircraft-specific written operating limitations issued by the Administrator.⁴

At the hearing, in addition to the already-mentioned facts, numerous witnesses testified about respondent's approach, the flight characteristics and operation of the F-100, and the applicability of the operating limitations to respondent's approach to the Lordsburg Municipal Airport. Respondent testified that he made a standard left-traffic visual approach, and that, throughout, he repeatedly communicated his position and intentions over the "unicom" traffic advisory frequency. The airport manager, who was in radio contact with respondent and

³ Respondent offered to stipulate, and the law judge found, that respondent operated the aircraft during the approach at 300 knots. According to the Administrator's witness, who sponsored "NTAP" data from Albuquerque Center, radar, which has a margin of error of up to 20 percent, depicted a *ground* speed of 375 knots during respondent's approach. For our purposes, we assume that respondent flew the approach at 300 knots.

⁴ Specifically, the operating limitations issued for N26AZ state that the "aircraft may not be operated over densely populated areas or congested airways, except when otherwise directed by Air Traffic Control" and require that respondent "plan routing that will avoid densely populated areas and congested airways when operating VFR."

ventured outdoors specifically to observe respondent's low pass, testified that "everything just seemed pretty normal."⁵

Respondent and the airport manager also testified that the airport manager radioed respondent that there were no other aircraft in the pattern, although it was conceded at the hearing that neither respondent nor the manager would necessarily be cognizant of other aircraft that, permissibly, could have been operating in the vicinity without radios. Finally, although the testimony corroborates the Administrator's complaint that respondent flew at a relatively-high rate of speed, i.e., 300 knots, it does not indicate that respondent's over-flight of the community of Lordsburg was abnormal for aircraft landing on runway 12.⁶

Respondent testified that 300 knots is the initial approach speed recommended in the aircraft handbook, and that he flew the approach to Lordsburg, as is his normal practice, at that speed to maintain reasonable aircraft pitch attitude and control effectiveness, and to ensure controllability in the event aggressive maneuvers became necessary to avoid collision with another aircraft.⁷ Respondent testified that he has accumulated

⁵ The airport manager also testified: "I have some jet traffic. Now, they don't usually go down the runway with any speed, they're usually landing or taking off. But other than that everything was about the same as any other aircraft." Hearing Transcript ("Tr.") at 253-254.

⁶ The community of Lordsburg is adjacent to the airport.

⁷ Respondent testified that the F-100 will stall, in the clean configuration, at approximately 260 knots in a 60-degree bank. Respondent suggested that the high-speed at which he conducted

less than 200 hours in the F-100. The Administrator's F-100 witness, Marion Donald Garrett, testified that he has accumulated over 2600 hours, as a pilot, in F-100s. Mr. Garrett testified that a normal F-100 approach speed, in the landing configuration, would be approximately 165 knots. Mr. Garrett testified that the "minimum safe" speed to maneuver an F-100 in the clean configuration is approximately 200 knots, but he stressed that for "a practice approach you normally would fly it ... not in a clean configuration but a landing configuration." Tr. at 73.

Mr. Garrett also testified that:

any time you're at high speed/low level the aircraft is very responsive. You can move rapidly in the vertical plane. So the hazards are a great risk of hitting the ground primarily, not maintaining proper control of an aircraft at that speed. Normally you would not fly that fast [300 knots] unless you were on a particular high speed/low level mission.

Tr. at 75. Moreover, Mr. Garrett testified that it is not necessary to light the afterburner on climb-out with an indicated airspeed of 300 knots, and explained that even on a routine go-around from an aborted approach "you would not engage the afterburner because the chances of it not lighting are perhaps real and it could actually be less thrust because the eyelids of an F-100 open and if the burner doesn't light you actually have less thrust." Tr. at 79-80.

Finally, there was testimony from Ronald Livingston, the FAA Principal Maintenance Inspector for Greco Air, Inc. ("Greco"),

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his approach was therefore prudent in case he needed to make abrupt, low-level maneuvers to avoid traffic around the airport.

respondent's company and the owner of N26AZ, and the FAA representative who issued N26AZ's operating limitations and airworthiness certificate.⁸ According to Inspector Livingston, who corroborated respondent's claims, Livingston told respondent, after consulting the FAA Principal Operations Inspector assigned to Greco, that the proscription of flight over densely-populated areas set forth in the operating limitations did not apply to takeoffs and landings.⁹

At the conclusion of the hearing, the law judge found that respondent's 300-knot approach was "appropriate for this model aircraft because of the testimony of the different F-100 pilots." The law judge also found, essentially, that respondent flew the aircraft along an appropriate ground track and at appropriate altitudes for an approach to runway 12.¹⁰ He concluded --

⁸ Inspector Livingston had retired from the FAA at the time of his hearing testimony.

⁹ According to the testimony, the previous operational limitations issued to prior owners of N26AZ expressly exempted the densely-populated proscription "for takeoffs and landings" but those issued to respondent did not. Respondent approached Inspector Livingston about the absence of the express language in his operating limitations. Livingston told respondent that flight over densely-populated areas was authorized for takeoff and landings. Livingston reasoned that the operating provisions of FAR Part 91, referenced in N26AZ's operating limitations, and other provisions in N26AZ's operating limitations, specifically authorized it and, therefore, no amendment of the written operating limitations was necessary.

¹⁰ The law judge also observed:

I will just say in passing that [Lordsburg has] a problem with their airport ... and it would seem that they could either move their airport or limit landings to runway 30 and takeoffs to runway 12 or at the very least they could make a right-hand pattern into runway

because, apparently, N26AZ was at all times an "experimental aircraft operating within the norms that the manual said that it could be operated" -- that respondent's operation was not careless. The law judge also found that Inspector Livingston had "specifically advised" respondent that he "could make approaches over [densely-populated] areas ... and that he didn't need any sort of exception written into [N26AZ's operating limitations]." However, he also found that "operating limitations ... cannot be amended by any oral statements of other representatives of the Administrator," and, therefore, he upheld respondent's violation of FAR section 91.319(c).

On appeal, respondent argues the Administrator should be estopped from prosecuting her FAR section 91.319(c) charge since Inspector Livingston advised respondent that the underlying proscription was not applicable to takeoffs and landings. The Administrator, in her appeal, argues that the law judge erred in dismissing the FAR section 91.13(a) charge, and argues that the 60-day suspension of respondent's ATP certificate should be reinstated. Both parties also submitted reply briefs in opposition to the other's respective appeals.

We turn first to respondent's appeal of the section 91.319(c) charge, which we affirm for reasons somewhat different

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12 to keep the aircraft away. Because it's real obvious ... [that] because of the location of their airport [Lordsburg is] going to get a lot of aviation activity over the downtown area.

Tr. at 298-299.

than those articulated by the law judge.¹¹ Although the Administrator appears to assume that her Inspector did advise respondent, albeit erroneously, that *approaches* were an authorized exception to the general proscription against over-flight of densely-populated areas, our review of Inspector Livingston's testimony convinces us that his guidance was in the context of landings and takeoffs. Inspector Livingston, and, indeed respondent, never testified that Inspector Livingston told respondent that his operation of N26AZ was exempt from over-flight of densely-populated areas for, specifically, approaches,¹² or, indeed, anything but takeoffs and landings.¹³ In our view, an approach, flown in the "clean" configuration and at an airspeed of at least 300 knots, or, in other words, an approach from which an actual landing on the runway would not be

¹¹ Although it is not the case here, we would not hesitate to conclude that the Administrator would be estopped from pursuing the FAR section 91.319(c) charge if it was shown that respondent was advised by the Administrator's apparently-authorized representative that approaches over densely-populated areas were expressly authorized, just as the Administrator would be estopped from pursuing a section 91.319(c) violation if it was shown that ATC had verbally directed the respondent over a populated area.

¹² There is inadequate support for the law judge's finding that Inspector Livingston authorized approaches over densely-populated areas, and it appears that the law judge erroneously assumed that any FAA landing-related authorization would also apply to respondent's approach and low approach, regardless of the speed or other particular circumstances.

¹³ Respondent testified that he "queried [Inspector Livingston] ... about flying into and out of densely-populated areas or over them, especially on the landing or taking off at airports." Tr. at 203. The operating limitations that were issued to previous owners of respondent's aircraft only exempt takeoffs and landings.

possible, is not within the "except when necessary for landing" exception.¹⁴ See Administrator v. Hart, 6 NTSB 899 (1988) (the "except when necessary for landing" exception to minimum altitude requirements does not apply to low approaches to unsuitable landing sites). Under the circumstances, we think the FAR section 91.319(c) charge was therefore proved by a preponderance of the reliable and probative evidence.¹⁵ Accordingly, respondent's appeal is denied.

Turning to the Administrator's appeal, only two members of the Board (Acting Chairman Carmody and Member Black) agree that the Administrator's appeal on the dismissal of the FAR section 91.13(a) violation should be granted. The Administrator's appeal on the dismissal of the FAR section 91.13(a) charge therefore fails for want of a majority vote. However, a quorum of the Board agrees that the Administrator's appeal of the reduction in sanction should be granted, in part, by imposing a 30-day suspension of respondent's ATP certificate for the single violation upheld.

¹⁴ We do not mean to imply that visual and instrument approaches and subsequent low approaches conducted for training purposes are necessarily not within the "except for landing" exception. Rather, our focus is merely on the circumstance where, as here, no landing *could* be made given the approach speed and configuration of the aircraft.

¹⁵ Respondent does not contest whether the community of Lordsburg is "densely-populated" within the meaning of FAR section 91.319(c).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal from the dismissal of the FAR section 91.13(a) charge and respondent's appeal are dismissed;
2. The Administrator's appeal regarding sanction is granted, in part;
3. The initial decision of the law judge is affirmed to the extent it sustained a violation of FAR section 91.319(c), and reversed, in part, on the issue of sanction;
4. The decision of the law judge to dismiss the FAR section 91.13(a) charge shall become final as the law of the case for the parties, but it shall not be precedent binding on the Board; and
5. The 30-day suspension of respondent's ATP certificate shall begin 30 days after the service date indicated on this opinion and order.¹⁶

CARMODY, Acting Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

¹⁶ For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(f).